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No. 251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Sioux Tribe of Indians of the Lower Brule Reservation, South Dakota, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on April 5, 1963.

Opinions Below

The opinion of the Indian Claims Commission is reported at 9 Ind. Cl. Comm. 538 (1961) and, together with the Commission's Findings of Fact Nos. 9-12 and 33-36, appears in the Appendix, *infra*, pp. 20-23. The opinion of the Court of Claims is reported at 315 F. 2d 378 (1963) and appears in the Appendix, *infra*, pp. 15-18.

Jurisdiction

The judgment of the Court of Claims was entered on April 5, 1963 (App. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1255 and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054, 25 U.S.C. 70s, as amended (hereafter the "Act").

Questions Presented

The Indian Claims Commission awarded petitioner a money judgment for $71,747.63 against the United States for a taking of tribal lands under the Fifth Amendment without just compensation. The Commission then wiped out that award by allowing as an offset gratuitous expenditures made by the United States for the purchase of land. Section 2 of the Act (App. 13) mandatorily made legal debts owed by the Tribe to the United States deductible from the award. Section 2 also permitted the Commission to inquire into and consider gratuities from the United States to the Tribe, and authorized the Commission to deduct all or part of such gratuities from an award "if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, * * *."

1. Is an award to an Indian tribe, based on a Fifth Amendment taking, of such a nature that, as a matter of law, good conscience could warrant wiping out the award by offsetting gratuities?

2. Where an award to an Indian tribe is subject to the offset of gratuities, may the Commission deduct such gratuities without first determining that (a) "in good conscience" the nature of the claim warrants such action and (b) "in good conscience" the entire course of dealings

and accounts between the United States and the tribe warrants such action?

Statute Involved

Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U.S.C. 70a, in pertinent part reads as follows:

> * * * the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * * *.

The full text of Section 2 is printed in the Appendix, pp. 13-14.

Statement

As of February 10, 1900, the United States took without any payment or offer of payment whatsoever, 25,968.24 acres of petitioner's reservation (Fdgs. 11-12, App. 20-21). Some 46 years later, Congress lifted the bar and permitted Indian tribes to sue the sovereign in the Indian Claims Commission under Section 2 of the Act.[1] In 1961, 15 years later, the Commission awarded the Tribe $71,747.63, representing the value of the land as of the time of taking plus just compensation measured in terms of interest. The Commission simultaneously wiped out the award by allowing the United States an offset of $157,404.46 for gifts of land the United States had made to the Tribe in the 1930's and

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[1] Prior to the Indian Claims Commission Act, Congress had barred Indians from prosecuting claims in the Court of Claims, the only possible forum. Act of March 3, 1863, c. 92, sec. 9, 12 Stat. 767, Rev. Stats. 1066.

1940's (Fdgs. 33-36, final order, App. 22-23, 35). The Court of Claims affirmed (App. 18).

Before the Court of Claims the Tribe made two primary points. First, that the Commission failed to determine that a claim for a Fifth Amendment taking is of such a nature that good conscience warranted the deduction of gifts from the award. Second, that the Commission failed to determine that the entire course of dealings and accounts between the United States and the Tribe in good conscience warranted the deduction of gifts from the award.

The court below did not discuss the statutory language or mention the legislative history of the Indian Claims Commission Act. It purported to examine into the nature of the claim, but instead of examining into the nature of the Tribe's Fifth Amendment claim, it examined into the nature of the Government's claim for a gratuity. On that misconception of the statute it apparently concluded that the Commission was justified in deducting a land gratuity from a Fifth Amendment award of just compensation (App. 17).

On the Tribe's second point, the court below conceived the statutory "good conscience" test as permitting the Commission silently to consider, without stating reasons or making evidentiary findings, the entire course of dealings and accounts and silently to determine whether in good conscience the gratuity should be allowed. On this basis, the court excused the Commission's failure to make even an ultimate finding that the entire course of dealings and accounts in good conscience warranted deduction of the gratuity (App. 17-18).

Reasons for Granting the Writ

1. The questions presented are of fundamental importance in cases under the Indian Claims Commission Act. The questions are present in every case in which the Commission makes an award. There are 439 cases now pending before the Commission, including 14 on appeal in the court below.[2] Review by this Court is essential to insure adjudication in accordance with the statute.

2. In a suit under the Indian Claims Commission Act, a decision permitting a gratuity to wipe out just compensation for a taking under the Fifth Amendment is erroneous. A gratuity is a free gift, whether it be of land or anything else. *Blackfeet et al. Nations* v. *United States*, 81 C.Cls. 101, 141 (1935). With one exception, there is no instance in Anglo-Saxon jurisprudence where a gift may be offset against a judgment for money. That exception is the case of Indian tribes under Section 2 of the Indian Claims Commission Act, an Act which in other respects was designed to place Indian tribes on equal footing with nontribal litigants.

Recognizing the unique exception it was creating, Congress circumscribed the authority it vested in the Commission to insure that no gratuities would be deducted from judgments except in the rare circumstance which might warrant a departure from the standards applied to nontribal litigants. Thus, Congress made it permissive for the Commission to consider or not to consider gratuities, and if it chose to consider them, to allow all, some, or no gratuities. But, in any case where the Commission determined to allow gratuities, Congress limited the Commission by fixing standards in terms of findings it required the Commission to make. "Good conscience" was the statutory bench mark. Gratuities were not to be deducted unless the "nature of

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[2] Figures furnished by the Indian Claims Commission as of May 2, 1963.

the claim * * * in good conscience warrant[ed] * * *." Gratuities were not to be deducted unless "the entire course of dealings and accounts between the United States and the claimant in good conscience warrant[ed] * * *." And the Commission was unequivocally instructed by Congress to make findings on both aspects of the bench mark.

In the 17 years of its life the Commission never has abided by the statutory tests and requirements. In no case has it chosen not to make inquiry into gratuities. In no case has it made evidentiary findings as to the nature of the claim or the entire course of dealings and accounts. In no case has it deducted anything less than all gratuities found allowable. The Commission, without exception, has mechanically deducted gifts from awards to tribes as if they were legal debts, without regard to the nature of the tribal claim or the entire course of dealings and accounts.

The question was presented to the Court of Claims for the first time in this case.[3] That court without discussion of the statutory language or mention of the legislative history affirmed the Commission's course of conduct.

The burden of proving an offset is on the Government

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[3] There are reasons why the question was not presented before now. Many years go by before an award is made to a tribe, following trials on the issue of liability and on the issue of value, with the possibility of intervening interlocutory appeals under Section 20(c) of the Act, as amended (25 U.S.C. 70s). Witness the 439 cases now pending 12 years or more before the Commission. (Footnote 2, *supra*.) The case at bar was filed October 19, 1950. By the time an award is entered long years have expired. Although the amount of gratuities offset may be substantial, tribes, even those possessed with the patience of Job, are reluctant to pursue appeals consuming additional years, while the main award stands unpaid without interest. The Commission's administration of the gratuities feature of the Act, now ratified by the decision below, has unfairly armed the Government with a weapon permitting it to obtain unjustified deductions of offsets, either through settlement or by forcing a trial resulting in the mechanical deduction of gratuities by the Commission without regard to the "good conscience" bench mark, the nature of the claim, or the entire course of dealings and accounts.

and this includes the obligation to establish that the entire course of dealings and accounts, in good conscience, warrants the deduction of gratuities from just compensation. *Kiowa, Comanche and Apache Tribes* v. *United States*, 143 C.Cls. 534, 543 (1958), certiorari denied 359 U.S. 934; *United States* v. *Seminole Nation*, 146 C.Cls. 171, 184 (1959). No evidence was adduced on the course of dealings and accounts. The Commission attempted to compensate for the Government's failure of proof by casting its sole finding on the point in language which distorts the statutory command. The statute calls for an affirmative finding that the "entire course of dealings and accounts * * * in good conscience warrants" the allowance of gratuities. The Commission found "that the course of dealings between plaintiffs and defendant *has not been such that the defendant is prohibited* from setting up against the award previously entered against it any credits or offsets" (emphasis supplied) (Fdgs. 34, App. 22). This distortion exposes the Commission's failure to comprehend its role in dealing with gratuities under the Act.

The court below failed to recognize that the effect of the Commission's distorted finding was to relieve the Government from the burden of proving the offset. The court overlooked the Commission's omission of any reference to the statutory "good conscience" bench mark. The court excused the need for evidentiary findings on the "fatigue theory of justice"—asserting voluminous findings would be required. The court substituted the undisclosed mental processes of the Commission's conscience for the statutory standards established by Congress (App. 18).

The court below was silent with respect to the legislative history of the Act, which so clearly refutes the court's conclusion. That history points up the paramount objective to eliminate the discriminatory practice of charging gifts

against legal awards to tribes. It confirms that gifts were not to be deducted except in extraordinary circumstances established by findings of fact.

As passed by the House H.R. 4497, which ultimately became the Indian Claims Commission Act, limited consideration of gratuities to claims based on "fair and honorable" dealings. Even within that limitation, the Commission's authority to deduct gratuities was conditioned on the requirement that it make findings that the entire course of dealings and accounts between the United States and the claimant in good conscience warranted such action. (H.R. 4497, 79th Cong., 1st sess., 1945). The report of the House Committee on Indian Affairs spells out its objective to establish "the principle of equality of treatment as between Indians and all other citizens * * *. The only fair solution, which is the one provided in the bill, is to allow the Government the same set offs as is allowed against other citizens bringing suits in the Court of Claims." (H. Rept. No. 1466, 79th Cong., 1st sess. (1945) pp. 11-12). Thus, to prevent discrimination against tribal litigants, the House allowed only legal offsets otherwise allowable under the general jurisdiction of the Court of Claims and specified that gratuities were to be considered only in fair and honorable dealings claims not cognizable in law or equity. The House report explains that: "Since no other statute permits the United States to set off gratuities against non-Indian claimants, it cannot be urged that the United States is not amply protected." (*Id.*, p. 12.)

The view that no discrimination should be practiced against Indians with respect to the deduction of gratuities was spelled out in vigorous terms by the Chairman of the House Committee on Indian Affairs during debate. "All we are insisting on in this bill is that the Indians be treated on an equal basis with other citizens where their suits are

the kind of suits that other citizens might bring." 92 Cong. Rec., May 20, 1946, p. 5313.

Before the Senate Committee on Indian Affairs, the Department of Justice objected to the House provision limiting the deduction of gratuities to moral claims, and insisted that gratuities should be deducted from legal claims also (Hearings, H.R. 4497, Senate Committee on Indian Affairs, 79th Cong., 2d sess. (1946) pp. 17, 19-20). The Department recommended language requiring the deduction of all gratuities (Hearings, *supra*, p. 25). The Senate Committee met the Government's objection part way. The Committee report recites (S. Rept. 1715, 79th Cong., 2d sess. (1946) p. 6):

> 3. *Offsets against claims*: The bill as it passed the House makes no provision for consideration by the Commission of expenditures or grants of money or property including gratuities made by the United States for the benefit of the claimant in cases based on strictly legal or equitable claims. Indian jurisdictional acts have required, in most instances, that the Court of Claims deduct items of this kind from any recovery against the United States found to be due by the court. Specific standards, however, have varied from act to act. Rather than prejudice the question of whether, in any particular case, gratuitous expenditures should be deducted from valid claims, the committee proposes that the Commission should be given the authority in each case to give such weight to these items as the circumstances of the case may justify. * * *

As reported, the bill passed the Senate on July 17, 1946 (92 Cong. Rec., pp. 9217-19).

The difference on the point of gratuities between the House and Senate versions was this: the House version

limited consideration of gratuities to moral (fair and honorable dealings) claims; the Senate version permitted the Commission to give weight to gratuities in all claims, moral and legal.

In conference, the differences were reconciled to produce what is now law. The explanatory statement of the Managers on the Part of the House, recites (House Conference Report No. 2693, 79th Cong., 2d sess. (1946), pp. 6-7):

> The bill as originally passed by the House also required deduction of legal offsets in all cases and permitted, in the discretion of the Commission, deduction of gratuities in cases based upon "fair and honorable dealings." The Senate amendment made all types of deductions wholly discretionary with the Commission.
>
> The conferees agreed that the Senate amendment gave too broad a discretion to the Commission and accordingly rewrote the section to require, first, that all deductions generally allowable in the Court of Claims against non-Indian claimants shall be allowed by the Commission in cases heard under this act, and, secondly, that gratuities of certain specified types, which are not allowable in the Court of Claims against non-Indian claimants, shall not be allowed by the Commission under this act against Indian claimants. The effect of the substitute language is to limit the discretionary authority of the Commission and to remove in large part the possible discrimination against Indian claimants in the matter of gratuities * * *.
>
> * * * In no other field of law, known to your conferees, is a defendant permitted to set off against a valid judgment a gratuity given to the plaintiff. * * *
>
> The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealing between the claimant and the United States

warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, such as expenditures made for the purchase of land.

This review of legislative history makes clear that, on the point of gratuities, Congress desired to halt the discriminatory practice of dealing with tribal litigants on a basis different from non-tribal litigants. The call to end the discriminatory practice of deducting gratuities from valid judgments in favor of Indian tribes is made repeatedly in the hearings and committee reports. However, the Indian Claims Commission Act did go beyond ordinary legal and equitable claims, and permitted moral claims based on fair and honorable dealings. Further, the field was new and there was uncertainty as to the nature of the claims which might arise. In that situation, the principle of no discrimination was compromised.

The Commission was directed to deduct legal debts due to the United States. As to gratuities, Congress authorized the Commission to inquire into whether they should be offset and imposed limitations on the Commission's authority as follows: First, Congress removed from the scope of the Commission's inquiry the specified kinds of gratuities set out in the last lines of Section 2 (App. 14); second, as to the remaining gratuities, including the purchase of land, the Commission was permitted to make inquiry. But its authority to allow all or part of such gratuities was on condition that it make findings of fact that in good conscience the nature of the claim and the entire course of dealings warranted such action.

The claim in this case is for just compensation under the Fifth Amendment, a strictly legal claim falling within clause 1 of Section 2 of the Act (App. 13). It is a claim of the

highest legal sanctity. If such a claim is not of the nature Congress intended the Commission to protect from gratuities, then no claim may be protected and the phrase "nature of the claim" in the statute means nothing.

Congress required the Commission to examine into the nature of the claim and into the entire course of dealings and accounts and to test its conclusions by the bench mark of "good conscience." This the Commission did not do and the court below erred in affirming.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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July 1963.

APPENDIX

Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U.S.C. §70a) reads as follows:

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended

gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 3-62

(Decided April 5, 1963)

SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA

v.

THE UNITED STATES

Marvin J. Sonosky, for appellant and appellee. *Strasser, Spiegelberg, Fried, Frank & Kampelman, John S. White*, and *Joel R. Feidelman* were on the briefs.

Maurice H. Cooperman, with whom was *Assistant Attorney General Ramsey Clark*, for the appellee and appellant.

Before JONES, *Chief Judge*, REED, *Justice (Ret.)*, sitting by designation, WHITAKER, LARAMORE and DURFEE, *Judges*.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on cross-appeals from the final determination of the Indian Claims Commission awarding plaintiff the sum of $71,747.63, including interest of $52,929.52, but offsetting against this sum a portion of the sum of $157,404.46 found to have been expended for the plaintiff as gratuities. One of defendant's counterclaims was allowed to the extent of $658.07, but the other two were disallowed.

The appeals present these questions: (1) whether the facts present a case of the taking of plaintiff's lands without the payment of just compensation and, hence, whether interest on the value of the lands was properly allowable; (2) whether defendant's third counterclaim for $248,757.30 was properly disallowed; and (3) whether any part of the gratuities of $157,404.46 should have been allowed as an offset.

On the first question we think there can be no doubt that

there was a taking of plaintiff's lands under the Fifth Amendment to the Constitution.

By the Act of March 2, 1889, 25 Stat. 888, six separate reservations were carved out of the Great Sioux Reservation, including one for plaintiff. The southern boundary of the reservation for plaintiff was described as the 44th parellel of latitude. Later, defendant undertook to locate the 44th parallel. As so located, it was marked on the ground, and the land lying outside the southern boundary, as so marked, was sold as public lands. Later, it was discovered that the said boundary had been improperly located and that lands, properly a part of the reservation, had been sold as public lands. It is for just compensation for these lands that plaintiff brought its proceeding.

Defendant says that it used the best instruments then available in determining the 44th parallel, and otherwise used due care and, hence, that the boundary as so determined must be considered as the correct boundary. As we said in our former opinion in this case, this is plainly untenable. The southern boundary was fixed as the 44th parallel, not as the 44th parallel as *determined by defendant.*

Defendant says an erroneous survey does not constitute a taking. This is correct, but a taking did occur when the United States appropriated the lands actually belonging to plaintiff and sold them. *United States* v. *Creek Nation*, 295 U.S. 103.

Although it might be said that there was no intentional appropriation of these lands, there was, nevertheless, a taking under the Fifth Amendment. Under earlier opinions of the Supreme Court, e.g., *Tempel* v. *United States*, 248 U.S. 121 (1918), it was said that it was necessary, to support a judgment for the taking of property by the United States, that there be a promise, express or implied, to pay for the lands taken. Later it was said that an implied promise to pay arises from the constitutional provision that lands shall not be taken without the payment of just compensation. It is the taking and the failure to pay just compensation that gives rise to the cause of action. *United States* v. *Dickinson*, 331 U.S. 745; *United States* v. *Causby*, 328 U.S. 256;

Jacobs v. *United States*, 290 U.S. 13; *Cotton Land Co.* v. *United States*, 109 Ct. Cl. 816, 829, *et seq.*, 75 F. Supp. 232, 233, *et seq.*; *Pueblo* v. *United States*, 140 Ct. Cl. 535; *L. L. Richard, et al.* v. *United States*, Ct. Cl. slip op. No. 298-57, decided October 5, 1960, 282 F. 2d 901.

On the second question, in the Indian Claims Commission, defendant asserted as an offset, against any amount to which it might be determined plaintiff was entitled, the amounts expended by defendant in the purchase of lands for plaintiff under the authority of section 5 of the Act of June 18, 1934, 48 Stat. 984. The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, permits the offset of amounts expended gratuitously for a plaintiff tribe, with certain exceptions which include all amounts expended under the Act of June 18, 1934, *supra*, other than amounts expended under section 5 thereof, "if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action." The Indian Claims Commission found, in finding 34:

> The Commission finds that the course of dealings between plaintiffs and defendant has not been such that the defendant is prohibited from setting up against the award previously entered against it any credits or offsets which it may have that are not precluded by Section 2 of the Indian Claims Commission Act, 60 Stat. 1049.

Plaintiff complains that this is supported by no evidentiary findings. Under the 1934 Act, the only claim which the Commission is authorized to offset against an award is one where, pursuant to the authority of section 5 of the Act, the Secretary of the Interior has purchased lands for Indians. That is the claim before us. Congress plainly contemplated the offset of such a claim. Nor do we think the Commission was required to set out in detail the entire course of dealing between the tribe and the United States to support its finding that the offset was

allowable. That would require voluminous findings in each case in which an offset was claimed. The Commission was merely directed to take them into consideration in determining whether in good conscience the offset should be allowed. In good conscience it thought it ought to be. We do not think it was required to set out all the things that went toward satisfying its conscience. This is especially true in the case of an offset under section 5 of the 1934 Act, which Congress so plainly thought should be allowed.

Defendant also complains of the disallowance of its counterclaim for $248,757.30. While this amount might have been used, and might still be used, as an offset against an award to the plaintiff, it seems plain that the defendant was not entitled to assert it as a counterclaim.

We held in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 658, that the excess of expenditures over and above an amount necessary to discharge the Government's liability to plaintiff under the Treaty of 1889 was a gratuitous expenditure. Gratuitous expenditures, of some sorts, may be deducted from amounts due a tribe, but of necessity they are not the subject of a counterclaim. The United States cannot give these sums to the Indians, and then sue the Indians to recover them, although it may offset them against a claim that it has not paid them all it was legally obligated to pay. The Commission was, therefore, correct in disallowing this counterclaim.

It results that the determination of the Indian Claims Commission is affirmed.

DAVIS, *Judge*, did not participate in the consideration and decision of this case.

Proceedings before the Commission. The Commission made Findings 1 through 8 in connection with its first decision dismissing this case (2 Ind. Cl. Comm. 183 (1952)), reversed by the Court of Claims (125 C. Cls. 439 (1953)). The eight findings relate to the identity of the Tribe, the ownership of its reservation, and the facts concerning the erroneous survey. No issue was presented on these matters in the court below and Findings 1 through 8 are not reprinted. Upon remand after reversal, the commission, following a further trial, entered its findings (Findings 9-23) and opinion concerning valuation (4 Ind. Cl. Comm. 250 (1956)), its findings (Findings 24-36) and opinion on offsets and just compensation (9 Ind. Cl. Comm. 538 (1961)), and its final judgment. With respect to proceedings before the Commission, only Findings 9-12 and 33-36 are germane to this petition. Findings 9-12, 33-36, the opinion and the final judgment of the Commission are set out below.

[4-250] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Decided: April 26, 1956

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to findings numbered 1 through 8 made in the prior decision of this Commission:

9. The land involved in this cause is a strip along the southern border of the Lower Brule Reservation in South Dakota. As indicated in the previous findings, there was an error in the survey as made in 1890 and as a result thereof the 44th parallel of latitude, which was officially designated as the southern boundary of the Lower Brule Reservation in the Act of March 2, 1889, 25 Stat. 888, was incorrectly located and resulted in a loss of a portion of the Lower Brule lands as described in the Act of March 2, 1889.

10. The correct location of the 44th parallel is 5,164 feet south of the monumented south boundary of the Lower Brule Reservation. The [251] area of land erroneously excluded from said reservation is 41.887 miles long, 0.978 of a mile wide and contains 40.965 square miles. This calculation was made by the U. S. Coast and Geodetic Survey (Def. Ex. 29).

11. The excluded land constitutes parts of Township 106 N., Ranges 73, 74, 75, 76, 77, 78 and 79 West of the 5th Principal Meridian, South Dakota, and to determine the acreage thereof the Bureau of Land Management located on copies of the official plats of said townships the 44th

parallel as determined by the Coast and Geodetic Survey and computed the acreage of the fractional quarter section north of the 44th parallel. (Def. Exs. 27 (d) (e), 31-37). The total acreage as shown by these plats is 25,986.24 and we find it the correct acreage of the excluded area. [252]

12. By the Act of March 2, 1889 (25 Stat. 888) it was provided in Section 21, "That all the lands in the Great Sioux Reservation, outside of the separate reservations herein described are hereby restored to the public domain * * *."

The act provided in Sec. 28, that it should become effective upon proclamation by the President. The Presidential Proclamation was issued on February 10, 1890 (26 Stat. 1554). The act further provided in Sec. 21, "that all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre * * *. And said lands shall thereafter be part of the public domain * * *." The Commission therefore finds that the date the Indian title to this excluded land passed to defendant was February 10, 1900, and is valued as of that date.

[258]

LOUIS J. O'MARR,
Associate Commissioner.

WM. M. HOLT,
Associate Commissioner.

[9-538] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Decided: October 27, 1961

ADDITIONAL FINDINGS OF FACT

The following additional findings of fact are supplemental to the findings numbered 1 through 23 made in the prior decisions of this Commission in this case (2 Ind. Cl. Comm. 189, reversed 125 C. Cls. 439; 4 Ind. Cl. Comm. 250).

[542] 33. The Commission concludes that the total amount of $157,404.46 expended by the United States pursuant to section 5 of the Wheeler-Howard Act, 48 Stat. 984, in acquiring for the Lower Brule Sioux the lands described in the 57 vouchers (Def. Ex. 04) constitutes a proper offset against the Commission's award in this action.

34. The Commission finds that the course of dealings between plaintiffs and defendant has not been such that the defendant is prohibited from setting up against the award previously entered against it any credits or offsets which it may have that are not precluded by Section 2 of the Indian Claims Commission Act, 60 Stat. 1049.

35. The Commission finds that the plaintiffs, having been deprived without payment of just compensation of the lands erroneously excluded [543] from their reservation through disposition of said lands by or to the United States, are entitled to recover of and from the defendant the adjusted gross sum of $18,818.11, plus interest at the rate of 5%

from February 11, 1900, to July 14, 1934, and at the rate of 4% from the latter date to date of entry of final order in this case, or a total sum of $71,747.63.

36. Defendant is entitled to offset $71,747.63 of the total sum of $157,404.46 expended for the purchase of land for the Lower Brule Sioux Indians (Edg. 33) against the award to plaintiffs of $71,747.63, leaving a balance which may be considered in any subsequent litigation between the parties of $85,656.83 in defendant's favor.

ARTHUR V. WATKINS,
Chief Commissioner.

WM. M. HOLT,
Associate Commissioner.

T. HAROLD SCOTT,
Associate Commissioner.

[9-544] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Decided: October 27, 1961

APPEARANCES:

Marvin J. Sonosky and John S. White, Attorneys for Plaintiffs.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This Commission on April 26, 1956, entered its Findings of Fact, Opinion and Interlocutory Order in this case in which it was decided that plaintiffs, The Sioux Tribe of Indians of the Lower Brule Reservation, South Dakota, were entitled to recover of and from the defendant the value of 25,968.24 acres of lands which were excluded from the Lower Brule Reservation because of the erroneous survey made in 1890 locating the southern line of said reservation. The Commission found the value of said lands as of February 11, 1909, the date of taking, to be seventy [545] five cents an acre and that the plaintiffs were therefore entitled to recover of and from the defendant the sum of $19,476.18, less such offsets or counterclaims as the defendant might prove under the Indian Claims Commission Act in further proceedings (4 Ind. Cl. Comm. 250-268).

Defendant filed an Amended Answer and a Second

Amended Answer setting forth certain counterclaims and offsets. A hearing was held with respect to these counterclaims and offsets at which time defendant introduced certain evidence in support of its contentions. Defendant also filed proposed additional findings of fact and a brief in support thereof and plaintiffs submitted their objections thereto. Defendant sets forth three counterclaims and limits its request and proof for offsets to a single offset of a $157,404.46 expended by the United States under the authority of Section 5 of the Act of June 18, 1934, 48 Stat. 984 in acquiring certain tracts of land for the Lower Brule Sioux between March 11, 1936 and August 15, 1950.

First Counterclaim—By the Act of June 10, 1896, 29 Stat. 334, I Kapp. 599, it was provided that such of the Lower Brule Indians as desired to might take allotments on the Rosebud Indian Reservation and the Secretary of the Interior was directed to pay the Rosebud Indians the sum of $1.00 an acre for such lands as were taken and allotted on that reservation. Payment to the Rosebud Indians was to be appropriated out of any money in the United States Treasury not otherwise appropriated, and charged against any funds belonging to the Lower Brule Indians held by the United States. By Article 2 of the agreement between the United States and the Rosebud Sioux Indians dated March 10, 1898, [546] ratified by Act of March 3, 1899, 30 Stat. 1364-66, I Kapp. 690-692, the United States agreed to pay *pro rata* in cash to the Rosebud Indians $1.25 per acre for the lands allotted to the Lower Brule Sioux who moved to the Rosebud reservation. By Section 3 of the 1899 Act, supra, Congress appropriated $148,600 to pay the Rosebud Indians for the lands allotted to the Lower Brule Sioux and $148,361.50 was disbursed for the lands so allotted. By Article 2 of the agreement dated March 1, 1898, ratified by the Act of March 3, 1899, 30 Stat. 1362, I Kapp. 688, the Lower Brule Indians ceded to the United States an area "estimated to contain about 120,000 acres" of land "in order that the United States may reimburse itself for the lands purchased for the Indians * * *" upon the Rosebud reservation.

Defendant contends that the lands so ceded by the 1898

agreement by the Lower Brule Sioux estimated to contain 120,000 acres actually consisted of 120,295.64 acres. Within this acreage, however, were 3,763.55 acres which were erroneously added to the Lower Brule Reservation on the west side of said reservation (see prior decision in this case, 4 Ind. Cl. Comm. 267, 268). Thus, defendant urges, the area actually ceded to the United States by the Lower Brule Sioux was but 116,532.09 acres. Defendant contends that based upon the total amount which the United States paid in cash to the Rosebud Sioux for the lands allotted to the Lower Brule Indians on the Rosebud reservation, the acreage allotted aggregated 118,689.2 acres ($148,361.50 divided by $1.25 equals 118,689.2 acres). Since the net acreage ceded to the United States by the Lower Brule Indians, 116,532.09 acres, to enable it to [547] reimburse itself for the purchased land, 118,689.2 acres, was deficient to the extent of 2,157.11 acres, defendant urges that the United States is entitled to have the sum of $2,696.39 (2,157.11 acres at $1.25 equals $2,696.39) deducted from the gross amount awarded by the Commission.

With respect to these contentions of defendant, plaintiffs insist there can be no counterclaim. Plaintiffs' counsel correctly points out that there was no contractual obligation on the part of the Lower Brule to reimburse the United States the amount of $148,361.50 disbursed by the United States to the Rosebud Sioux for the lands allotted to Lower Brule Indians on the Rosebud Reservation. The plaintiffs only agreed to cede to the United States an *estimated* 120,000 acres of land in order that the United States might reimburse itself for the purchase of land on the Rosebud Reservation. The Lower Brule Indians did not guarantee that the ceded area would be equivalent in worth to the lands purchased on the Rosebud Reservation. The United States does not show that the ceded area, even reduced in acreage by excluding 3,763.55 acres, was disposed of for less than the amount dispursed by the United States for the lands on the Rosebud reservation. The counterclaim is denied.

Second Counterclaim—Under this counterclaim defendant seeks to have the sum of $659.67 credited against the gross amount awarded by the Commission. Defendant

points out that this Commission in its prior decision determined that of the acreage excluded on the south side of the Lower Brule Reservation some 1,851.56 acres of land were disposed of by the United States pursuant to the terms of the Act of March 2, 1889, 25 Stat. 888, I Kapp. 328, for the sum of $1,396.44, [548] between February 10, 1890 and February 10, 1900 (4 Ind. Cl. Comm. 250, 255, 267). Under the terms of this act the United States also agreed to accept all undisposed of lands at the end of ten years and pay for them at the rate of fifty cents an acre. The Sioux Tribe and each of the constituent Sioux groups, including the Lower Brule Sioux, brought suit in the Court of Claims for an accounting of the proceeds received from lands disposed of during the 10 year period (1890-1900) pursuant to the 1889 Act and fifty cents per acre for all lands unsold as of February 10, 1900, and accepted by the United States. The Court of Claims determined that the Sioux Tribe was entitled to a total credit of $5,307,655.87 for both land categories for which defendant was required to account (see 97 C. Cls. 391, 396-7). Later (105 C. Cls. 658) the Court of Claims made a complete accounting and stated the account current between the parties as of June 30, 1925, and found on the basis of proper accounting that there was no amount then due to the plaintiffs under the terms and conditions of the 1889 agreement. The Lower Brule interest in the permanent fund created by the 1889 Act was a *pro rata* share based upon the population of these Indians of 1,019 in relation to the total Sioux population of 20,780, namely, 4.903% (105 C. Cls. 661). Since the Sioux Tribe was found entitled to a total credit of $5,307,655.87 which included proceeds of the 1,851.56 acres within the erroneous survey acreage disposed of between 1890 and 1900 and fifty cents an acre for the balance of the 24,116.78 acres within the subject tract, the defendant is entitled to credit against the gross amount awarded by the Commission the amounts already credited to the Lower Brule Indians, [549] namely, 4.903% of $1,363.50, or $66.85, and 4.903% of $12,058.34, or $591.22. Accordingly, a total sum of $658.07 will be deducted from the sum of $19,476.18 which the Commission found the plaintiffs were entitled to recover, leaving an

amount totaling $18,818.11. In view of the decision of the Court of Claims crediting these sums to the plaintiffs, the arguments made by plaintiffs in this case against allowing this counterclaim are not persuasive.

Third Counterclaim—This counterclaim involves the sum of $248,757.30 which the defendant contends the Court of Claims found was an overpayment to the Lower Brule Sioux in 105 C. Cls. 725, 815-6, under the terms of the Act of March 2, 1889, 25 Stat. 888. As previously stated the Court of Claims in 97 C. Cls. 391 held the Sioux Tribe was entitled to a total credit of $5,307,655.87. In further proceedings the Court of Claims in 105 C. Cls. 725, 815-816, in making a complete accounting and stating the account between the parties as of June 30, 1925, found that the principal and interest of the permanent fund of plaintiff arising under the agreement of 1889 from the proceeds of the ceded lands and miscellaneous receipts was completely exhausted through proper and leg.. reimbursements from and charges against the fund long prior to 1925 and that the correct account current further showed that in addition "to the said permanent fund (principal and interest) belonging to plaintiff being exhausted there were, on June 30, 1925, large deficits against the various bands of plaintiff (except the Northern Cheyennes) on the several reservations, to which said funds were allocated, as a result of large expenditures by defendant from public funds for the [550] benefit of the various bands of plaintiff tribe." The Court of Claim in its Finding 9(a) set the net excess of expenditures at $4,911,284.22, and allocated to the Lower Brule Sioux $248,757.30 of the total amount. In speaking of these sums the Court of Claims said (105 C. Cls. at page 671):

> * * * These excess expenditures over all funds belonging to plaintiff from the ceded lands under the agreement of March 2, 1889, and from miscellaneous receipts, were *gratuitous expenditures* from public funds for the benefit of plaintiff for the purposes stated in the account current for the years prior to the years in which permanent funds belonging to the several

> Sioux Tribes or bands were exhausted. * * * (Underscoring supplied)

In addition to the accounting respecting the proceeds of the land categories discussed above the Court of Claims was called upon to state the account in seven cases presented by separate amended petitions presenting claims for accounting with respect to the receipts and disbursements by defendant, as trustee, of certain trust funds derived from the sale or disposition of lands within the separate reservations created out of the Great Sioux Reservation by the 1889 agreement (*The Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725). In the accounting with respect to these claims the Court of Claims found certain sums to be recoverable for the plaintiff groups but permitted the United States to *offset* against the awards sufficient amounts of the excess expenditures of $4,911,284.22 as shown as having been made to the several Sioux groups respectively to wipe out the amounts the Court found the several groups were entitled to recover. In speaking of these offsets the Court of Claims said in 105 C. Cls. 658, at page 687: [551]

> * * * However, to the extent that the separate tribes or bands of plaintiff in cases C-531(18) to (24), inclusive, are held entitled to recover in respect of those separate funds, the excess expenditures from public funds for the purposes above mentioned under the supposed authority of the 1889 agreement are, in effect, charged against the separate funds of these tribes or bands by offsets. See C-531 (18) to (24), inclusive, decided this day.

And see Finding of Fact 80 of the Court of Claims, 105 C. Cls. at pages 767-768, in which as to these excess expenditures the Court states that "under terms of the act of March 2, 1889, *supra*, and section 2 of the jurisdictional act herein [41 Stat. 738] they are proper legal and equitable offsets against the amounts determined to be due the Indians, * * *."

Defendant also cites further decisions by the Court of Claims in 112 C. Cls. 39 and 112 C. Cls. 50 in these Sioux accounting cases in support of its contention that the $248,757.30 excess expenditures for the benefit of the Lower Brule Sioux constitute unused credits in favor of the United States which are subject to being used as a counterclaim. These two decisions resulted from the fact that while the two Sioux cases were pending in the Court of Claims the Indian Claims Commission Act was passed and the Supreme Court, upon application of the Sioux, remanded the cases to the Court of Claims to enable it to determine "whether the Act of August 13, 1946, gives rise to any claims which petitioners may assert to affect the judgment heretofore entered." In the case involving the decision of the Court of Claims in 105 C. Cls. 39 respecting the accounting under the 1889 agreement, petitioners filed a supplemental petition on remand alleging that under the terms of the original jurisdictional act as enlarged and extended by Sections 2 and 11 [552] of the Indian Claims Commission Act the expenditures totaling $8,438,038.38 made by the Government under the provisions of section 17 of the 1889 agreement for beneficial objects should not be held to be reimbursable expenditures under Sections 17 and 22 of the 1889 agreement and chargeable against plaintiffs' permanent fund, including interest. Plaintiffs further urged the Court of Claims to eliminate the $8,438,038.38 as a reimbursable charge and as an offset against its funds. In dismissing the supplemental petition the Court of Claims said in part:

> Plaintiff next alleges and contends that the sum of $8,438,038.38, expended for the agricultural objects and benefits, was for an educational purpose under the 1889 agreement and is, therefore, denied to defendant as an offset under section 2 of the Act of August 13, 1946, and the course of conduct of the officials of the Interior Department. In our opinion of February 4, 1946, we denied plaintiff's claim that this sum was expended for educational purposes within the meaning of the agreement of 1889, and we find no reason to change that conclusion. Moreover, the amount is not

> allowed and cannot be treated as an offset of an expenditure gratuitously made for educational purposes, as that term is usually and generally understood, but is allowed to defendant as an expenditure of a sum advanced and expressly made reimbursable by sections 17 and 22 of the agreement. The sum of $8,438,038.38 is gratuitous expenditure only to the extent that it exceeded, with other expenditures, the total amount of the permanent fund and interest. But we think it is clear that this excess of $4,911,284.22 was not an expenditure for "education," as that term was used in section 2 of the Act of August 13, 1946. Industrial schools and education were mentioned in the 1889 agreement, but these expenditures were not placed in that class. Therefore, the provision of Section 2 of the Act of August 13, 1946, with reference to the non-allowance as offsets of gratuitous expenditures for educational purposes, has no application here.

In short the Court of Claims held that the expenditures for beneficial objects were allowed defendant as a sum advanced and expressly made reimbursable as legal credits by sections 17 and 22 of the agreement [553] of 1889, and that the excess expenditures, that is those sums over and above what was necessary to equal the total amount of the permanent fund and interest, were gratuitous expenditures. Since the Court of Claims in case No. C-531 (18-24), 105 C. Cls. 725, had allowed the defendant to offset certain of these gratuitous expenditures against certain sums found due the several groups of Sioux with respect to trust funds realized from the proceeds of sale of lands in their respective reservations it was necessary for the Court on remand to consider whether these excess expenditures totaling $4,911,284.22 were expenditures for "education" under the Indian Claims Commission Act. The Court held they were not. The Court stated in dismissing plaintiffs' supplemental petition in case No. C-531 (18-24), 112 C. Cls. 50, on remand that:

> The claim of plaintiff with respect to the elimination of the offsets, representing reimbursable expenditures under the 1889 agreement, used and applied against

the amounts originally awarded in these cases, is denied on the authority of our opinion and decision this day entered dismissing the supplemental petition in case C-531 (11).

The Court of Claims in these previous cases did not hold that the Sioux Tribe or any of its constituent bands or groups were legally liable to the United States for the total amount of the excess expenditures but did allow the United States to use part of these gratuitously expended funds to offset the amounts the several groups were found entitled to recover in case No. C-531 (18-24), 105 C. Cls. 723. The $248,757.30 of the excess expenditures charged to the Lower Brule Sioux by the court of Claims is not a credit that may now be deducted from the gross amount which the Commission has found plaintiffs are entitled to recover in this case. Whether the amount might be a proper gratuitous offset need [554] not now be determined since it is not here claimed by defendant as an offset and for reasons stated below with respect to offsets claimed by defendant.

Offset

The single, designated offset category upon which proof was adduced by the defendant in this case was an item of $157,404.46 for the purchase of lands for the Lower Brule Sioux Indians by the United States between March 11, 1936 and August 15, 1950. Section 5 of the Act dated June 18, 1934, 48 Stat. 984, provides the authority for the purchase of lands for Indians to the Secretary of the Interior. Section 2 of the Indian Claims Commission Act provides that this Commission may consider expenditures made under Section 5 of the 1934 Act, *supra*, when dealing with the question of offsets. Plaintiff does not deny that the United States purchased land under the Act of June 18, 1934, in the amount of $157,404.46 for the Lower Brule Sioux Tribe. Plaintiff, however, contends the offset should not be allowed since (a) there is no proof "that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants

such action, * * *" and (b) Congress did not intend that this Commission should offset gratuities against a legal claim such as is presented in this case but rather the discretion given the Commission to inquire into gratuitous expenditures is limited to claims under clause (5) of the Indian Claims Commission Act, that is moral claims. The Commission has found that the record in this case shows that there is nothing in the nature of the claim here presented and the entire course of dealings and accounts between the United States and plaintiffs which [555] would warrant the Commission's refusal to consider the offset herein claimed by defendant. Our views with respect to the contentions made by plaintiffs' counsel as to a limitation of gratuitous offsets to clause (5) cases are fully set forth in the opinions rendered in the *Red Lake and Pembina Chippewa* case, Dockets 18-A, 113 and 191, decided by this Commission on October 5, 1961. The sum of $157,404.46 expended for the purchase of land is an allowable offset. *Quapaw Tribe* v. *United States*, 1 Ind. Cl. Comm. 644, 649, aff'd in 128 C. Cls. 45, 66-67.

Just Compensation

On October 6, 1959, plaintiffs filed a "Motion to Modify Interlocutory Order," in which plaintiffs moved the Commission to modify its interlocutory order entered April 26, 1956, to provide for just compensation on the ground that the lands excluded from the reservation by the erroneous survey were taken under the Fifth Amendment of the Constitution of the United States, citing *United States* v. *Creek Nation*, 295 U.S. 103, 108-110 (1935); *Yakima Tribe* v. *United States*, 5 Ind. Cl. Comm. 636, 678 (1957); and *Uintah and White River Bands of Utes* v. *United States*, No. 48560, decided June 5, 1957, C. Cls. , (Slip opinion, pp. 2, 10, 94). The Commission concludes that the plaintiffs were deprived of their lands omitted from their reservation due to the erroneous survey without the payment of compensation therefor. Under the facts in this case and the law of the cases above cited with respect to similar takings of Indian reservation lands the plaintiffs herein

are entitled to just compensation. The adjusted gross amount which the Commission has this day determined the plaintiffs are entitled [556] to recover will be incremented by the allowance of interest computed at the rate of 5% from February 11, 1900, the date of taking, to July 14, 1934, and at 4% per annum thereafter until entry of the final order herein.

Conclusion

The plaintiffs are entitled to recover from the defendant the sum of $18,818.11 together with interest thereon at the rate of 5% per annum from February 11, 1900, to July 14, 1934, and at the rate of 4% from July 14, 1934, to date of this decision, or a total amount of $71,747.63. Against this total sum the defendant is allowed to offset $71,747.63 of the $157,404.46 claimed as an offset. Since the defendant is entitled to offset a sum equal to the amount plaintiffs are entitled to recover no amount is due plaintiffs and judgment will be entered accordingly.

WM. M. HOLT,
Associate Commissioner.

We concur:

ARTHUR V. WATKINS,
Chief Commissioner.

T. HAROLD SCOTT,
Associate Commissioner.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

FINAL ORDER

Upon all the findings of fact filed herein, being those numbered 1 through 36, all of which are made a part of this order, the Commission concludes as a matter of law that plaintiffs are entitled to recover from the defendant the sum of $18,818.11, plus interest at the rate of 5% from February 11, 1900, to July 14, 1934, and at the rate of 4% from the latter date to the date of entry of this order, or a total sum of $71,747.63; that defendant is entitled to offset against such recovery $71,747.63 of the total sum of $157,404.46 expended by defendant for the purchase of land for plaintiffs, leaving a balance which may be considered in any subsequent litigation between the parties of $85,656.83 in defendant's favor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COMMISSION that since the defendant is entitled to offset a sum equal to the amount plaintiffs are entitled to recover there is no amount due to plaintiffs.

Dated at Washington, D. C., this 27th day of October, 1961.

ARTHUR V. WATKINS,
Chief Commissioner.

WM. M. HOLT,
Associate Commissioner.

T. HAROLD SCOTT,
Associate Commissioner.

(7422-9)

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 251

SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and opinions of the Indian Claims Commission are reported at 9 Ind.Cl.Comm. 538, 544; 4 Ind.Cl.Comm. 250, 259; and 2 Ind.Cl.Comm. 183, 189. The opinions of the Court of Claims are reported at 315 F.2d 378 and 111 F.Supp. 766.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1963. The petition for a writ of certiorari was filed on July 2, 1963. The jurisdiction of

this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the Indian Claims Commission properly offset against the amount it awarded petitioner a sum, equal to the award, that had been gratuitously expended by the United States in purchasing land for petitioner.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050, 25 U.S.C. 70a, in pertinent part reads as follows:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of

Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

STATEMENT

By the Act of March 2, 1889, c. 405, 25 Stat. 888, six separate Indian reservations were carved out of the Great Sioux Reservation in Dakota Territory. One of these reservations was set apart for the Lower Brule Sioux. The 1889 Act defined the southern boundary of the reservation set aside for the Lower Brule Sioux as running along the 44th parallel of latitude (Pet. App. 20, Fdg. 9). Using the most modern instruments and technology available at the time, the United States surveyed and monumented

the southern boundary line along its 42-mile length and for 44 years the parties mutually acted upon the assumption that the monumented line was the boundary (Appendix, *infra*, pp. 14-15, Fdgs. 4-6). Improved instruments and methods eventually revealed that there was an error in the survey in locating the 44th parallel, resulting in the exclusion of 25,968.24 acres that were supposed to be part of the Lower Brule Reservation (Pet. App. 20-21, Fdg. 11).

On October 19, 1950, the Lower Brule Sioux instituted this suit under the Indian Claims Commission Act to recover compensation for the land in the excluded area. The Commission dismissed the suit, 2 Ind.Cl.Comm. 189, was reversed by the Court of Claims, 111 F.Supp. 766, and thereafter awarded the petitioner $19,476.18 for the excluded acreage, 4 Ind.Cl.Comm, 259, 266-268. Later the Commission found that the petitioner was entitled to just compensation under the Fifth Amendment for the excluded land, allowed a credit of $658.07 against the award, and added interest to the reduced principal sum, thereby increasing the total award to $71,747.63, 9 Ind.Cl.Comm. 544, 547-550, 555-556 (Pet. App. 22-23, Fdg. 35).

Between 1936 and 1950, the United States expended $157,404.46 for the purchase of other land for the Lower Brule Sioux, under authority of Section 5 of the Act of June 18, 1934, 48 Stat. 984, 985, 25 U.S.C. 465. Section 2 of the Indian Claims Commission Act, *supra*, p. , allows the Commission to consider expenditures made under Section 5 of the 1934 Act and, in its discretion, to offset such, ex-

penditures against tribal awards. After making numerous findings concerning the expenditure (Appendix, *infra*, pp. 16-18, Fdgs. 30-33), the Commission found that (Pet. App. 22, Fdg. 34):

> * * * the course of dealings between plaintiffs and defendant has not been such that the defendant is prohibited from setting up against the award previously entered against it any credits or offsets which it may have that are not precluded by Section 2 of the Indian Claims Commission Act, 60 Stat. 1049.

Consequently, the Commission applied $71,747.63 of the $157,404.46 expended by the United States as an offset against the tribal award of $71,747.63, leaving a balance of $85,656.83 in the United States' favor, to be considered in any subsequent litigation between the parties, 9 Ind.Cl.Comm. 538, 544, 554-555 (Pet. App. 23, Fdg. 36).

The Court of Claims unanimously affirmed the decision of the Indian Claims Commission, 315 F. 2d 378 (Pet. App. 15-19).

ARGUMENT

The decision of the Court of Claims is plainly correct, and there is no occasion for this Court to review it.

1. Section 2 of the Indian Claims Commission Act provides:

> * * *; the Commission may also inquire into and consider all money or property given to or funds expended gratitously for the benefit of the claimant and if it finds that the nature of

> the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * * *.

The Indian Claims Commission acted within its clear and specific statutory authority under Section 2 of the Indian Claims Commission Act, *supra*, p. , when it offset against petitioner's award the expenditures made by the United States in purchasing land for petitioner.

Petitioner's contention appears to be that the Commission had no authority to make the offset because the award was for a Fifth Amendment taking. Neither the express language of the statute nor the legislative history relied upon by petitioner supports that argument (Pet. 9-11). A fair reading of that history shows that the two Houses originally disagreed over the deduction of gratuities from awards for legal and equitable (as distinguished from moral) claims. The compromise finally agreed upon specifically enumerates certain types of gratuities that are not to be set off against any award (*supra*, p.). But all other gratuities were permitted to be deducted, at the discretion of the Commission, from legal and equitable, as well as moral, awards. House Conf. Rept. No. 2693, 79th Cong., 2d sess. (1946), pp. 6-7 (Pet. 10-11). Nothing in the history of the Act or in the plain words of the pertinent portion of the statute, *supra*, p. , indicates that a claim found by the Commission to be based upon the Fifth

Amendment was to receive preferential treatment. What the history does show is that Congress specifically contemplated the offset of expenditures for the purchase of land, such as those involved here (H. Conf. Rept. No. 2693, 79th Cong., 2d sess. (1946), p. 7):

> The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealing between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, *such as expenditures made for the purchase of land.* [Emphasis added.]

2. Petitioner's second contention is that the Commissioner failed to make the necessary finding that "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants" the offset.

The first nine findings of the Commission (App., *infra*, p.) relate to the "nature of the claim"; and virtually every finding relates to the "course of dealings" between the parties. These findings, together with the record, constitute an entirely adequate basis for ultimate Finding No. 34 (*supra*, p. 5) (Pet. App. 22). Cf. *Alger* v. *United States*, 171 F. 2d 667, 668 (C.A. 7); *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F. 2d 957, 958 (C.A. D.C.), certiorari denied, 315 U.S. 805. Furthermore, respondent's quarrel with the content of that ultimate finding is purely verbal; to say, as the court did, that the course of dealings between the parties

"has not been such that the defendant is prohibited from setting up" the credit is tantamount to saying that the course of dealings "in good conscience warrants" the offset. The fact that the court did not parrot the language of the statute does not suggest that its finding was not made "in good conscience." The form of ultimate finding employed here has consistently been relied upon by the Court of Claims in Indian claims cases. *Quapaw Tribe of Indians* v. *United States*, 128 C. Cls. 45, 62; cf. *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 288 (C. Cls.) certiorari denied, 350 U.S. 848.

The court below correctly disposed of petitioner's contention that more detailed findings are needed (315 F. 2d at 380):

> * * * Congress plainly contemplated the offset of such a claim. Nor do we think the Commission was required to set out in detail the entire course of dealing between the tribe and the United States to support its finding that the offset was allowable. That would require voluminous findings in each case in which an offset was claimed. The Commission was merely directed to take them into consideration in determining whether in good conscience the offset should be allowed. In good conscience it thought it ought to be. We do not think it was required to set out all the things that went toward satisfying its conscience. This is especially true in the case of an offset under section 5 of the 1934 act, which Congress so plainly thought should be allowed.

Petitioner lays stress on the fact that the government has the burden of proving its entitlement to the offset. Certainly the government must establish that gratuities in the claimed amount were in fact made. Where, as here, the government has made a prima facie showing that its conduct toward the Indians has been fair and honorable—as it has plainly done here in purchasing land for them—it is the tribe's responsibility, we submit, to come forward with specific evidence, or at least a specific allegation, of impropriety. Having failed to specify any respect in which the government's conduct was tainted, respondent clearly cannot complain that the court has abused its discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
RICHARD N. COUNTISS,
Attorneys.

AUGUST 1963

APPENDIX

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Decided: May 29, 1952

Appearances:

Ralph H. Case,
Attorney for Plaintiffs.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General, Wm. Amory Underhill,
Attorneys for Defendant.

FINDINGS OF FACT

1. The plaintiffs are Sioux Indians referred to in the Act of Congress approved March 2, 1889, as the Indians, or their descendants, receiving rations and annuities at the Lower Brule Agency, South Dakota, and as such are entitled to institute this action under the Indian Claims Commission Act.

2. By Section 5 of the Act approved March 2, 1889 (25 Stat. 888, 889, I Kapp. 329) there was set apart for the Sioux Indians, receiving rations and annuities at the Lower Brule Agency, the lands described as follows:

> That the following tract of land, being a part of the said Great Reservation of the Sioux Na-

tion, in the Territory of Dakota, is hereby set apart for a permanent reservation for the Indians receiving rations and annuities at the Lower Brule Agency, in said Territory of Dakota, namely: Beginning on the Missouri River at Old Fort George; thence running due west to the western boundary of Presho County; thence running south on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of township number seventy-two; thence south on said township western line to an intersecting line running due west from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri River at Fort Lookout; thence north in the center of the main channel of the said river to the original starting point.

3. B. H. Sullivan, United States Surveyor General for the District of Dakota, issued special instructions to Edwin H. Van Antwerp, United States Deputy Surveyor, dated March 12, 1890, for the purpose of establishing the lineal boundaries of the Lower Brule Reservation, which read in part as follows:

> The present western terminus of the established 1st. standard parallel north is the standard corner to townships 5 north of ranges 75 and 76 west. From this standard township corner, if it can be completely identified, you will extend said standard parallel on a true latitude curve. If said standard township corner cannot be assuredly determined, you will go to the most westerly established standard corner which can be completely identified and from it retrace the standard to the line between ranges 75 and 76 west, T. 105 N. restoring the missing corners,

and then continue the standard parallel as stated to the S. W. standard corner for T. 105 N., R. 79 W. The correct establishment of this corner must have your special attention and it should so appear in your notes, as both the west boundary of the Lower Brule Indian reservation and line upon which two systems of survey close, depend upon its determined position.

* * * *

From the standard corner for west boundary of range 79 west, on the 1st. standard parallel north, * * * you will run the range line due north, establishing at the legal distances, the usual quarter-section, section and township corners until at 24 miles you will establish the closing corner of said range line upon the 2nd standard parallel. Thence you will run due west on said 2nd. standard parallel 35.57 chains and establish the standard ¼ section corner on south boundary of section 31, T. 109 N., R. 79 W., marked in the usual manner and at 75.57 chains, set the S. W. standard corner for T. 109 N., R. 79 W. of the 5th P. M. From the last named standard corner, you will continue the west boundary of range 79 due north establishing at the legal distances the usual quarter section, section and township corners until you arrive at a point due west from Old Fort George as near as you can estimate, where you will set a temporary point for the northwest corner of said reservation.

You will then proceed to Old Fort George. As no diagram of the Post or plan of the buildings can be found, you will determine the middle point of the ruins as the place for the initial point of the boundary of the Lower Brule Indian reservation, * * *. You will then return

to the said initial point at Old Fort George and run thence due west establishing half-mile and mile corners at each 40 and 80 chains counting from the initial point, and at intersection with the west boundary of range 79, you will establish the *permanent* northwest corner of the said reservation, destroy the temporary corner so stating in your notes, and perfect your range boundary entries.

* * * *

Measurements of the west boundary of range 79 and of connecting lines will be carefully made. Measurements along the 1st standard parallel and the north and south boundaries of said reservation will be made by two sets of chainmen; and you will do what may be necessary to prevent collusion, the object being to obtain two independent reports from your chainmen, which may thereby serve as a check on possible error.

* * * *

I enclose herewith copies of the Act approved March 2, 1889 and of the President's proclamation of February 10, 1890, giving effect to said Act. You will carefully read both and ascertain the rights of resident Indians upon the ceded lands set forth * * *.

* * * *

* * * you are advised that the position of the S. W. corner of said reservation, the same being the intersection of the parallel of 44° with the west boundary of range 79 west, is to be established by you at a point on said range boundary distant *11 miles 38.34 chs. north* from the S. W. standard corner to T. 105 N., R. 79 W. on the 1st standard parallel. * * *.

4. Geodetic Triangulation is the most modern and exact method known for establishing the ground location of Meridians and Parallels. In 1890 the Coast & Geodetic Survey had prosecuted its triangulation station network westward only as far west as Central Kansas and was then more than 400 miles from Presho. It was therefore necessary to survey the Lower Brule reservation as a detached individual project and by astronomic observations.

In 1890, there was in general use by field surveyors of the General Land Office, transits with a solar attachment graduated to 1′ on the vernier, which is the equivalent of 6000 ft. on the ground. Measurements were then made with the now archaic link chain. They also used a sextant to check their ground location but that instrument also was too crude to enable the surveyor to detect so small an error as one mile on the ground.

The first Standard Parallel is a surveyed monumented line established by the General Land Office. It was officially located at 43° 50′ north latitude. During 1877-88 it had been surveyed and monumented westward to Tp. 76.

In conformity with his instructions, Van Antwerp surveyed and monumented the First Standard Parallel westward from range 75 to 79 by two sets of chainmen working independently and from that intersection, similarly surveyed a line due north 11 miles 38.34 chains (10′ of latitude translated by Sullivan into horizontal distance) and thus located the 44th parallel of latitude—the southwest corner of the reservation.

At the point so determined he confirmed his position as being on the 44th parallel by the Solar Transit, however the degree of refinement of the instrument —1′ on the vernier—means a possible deviation of

6000 ft. on the ground. In 1890 no deviation within 6000 ft. of the theoretically correct position was susceptible of detection. Neither the Sextant nor solar transit permitted any greater degree of exactitude.

5. Since the year 1890 the Coast and Geodetic Survey and the United States Geological Survey each has established many new and adjusted triangulation points from which the geographical location of meridians and parallels may be more accurately determined. These points, and the more improved surveying instruments available, have from time to time altered the position of the lines of latitude and longitude as represented upon topographical maps. These changes on the maps did not in fact change the location of the monuments actually placed on the ground at the time of the survey of the lands in 1890.

6. The 44th parallel as established in 1890 and as marked by monuments was and is the officially determined and approved southern boundary of the Lower Brule Reservation, and was an official declaration of the correct position on the ground of the southern boundary of the reservation. The boundary as then determined, laid out, and monumented was mutually recognized for 44 years, and was consistently acted upon by both parties and is today the recognized southern boundary of the reservation.

7. In drawing meridian and parallel lines upon maps, the compiler locates them by reference to fixed points established. As these fixed established points are revised with the progress of the geodetic work, the position of latitude lines upon maps changes correspondingly. This inconstant or ambulatory character of meridians and parallels is an inherent attribute of longtiude and latitude lines appearing upon maps.

8. No actual survey on the ground has ever been made locating the 44th parallel of latitude.

* * * *

Decided: October 27, 1961

ADDITIONAL FINDINGS OF FACT

The following additional findings of fact are supplemental to the findings numbered 1 through 23 made in the prior decisions of this Commission in this case (2 Ind. Cl. Comm. 189, reversed 125 C. Cls. 439; 4 Ind. Cl. Comm. 250).

* * * *

30. Section 5 of the Act dated June 18, 1934, 48 Stat. 984, provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, * * * including trust or otherwise restricted allotments whether the allottee be living or deceased, * * * for the purpose of providing land for Indians.
>
> For the acquisition of such lands, * * * and for expenses incident to such acquisition, there is hereby authorized to be appropriated out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: * * *.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired,

and such lands or rights shall be exempt from State and local taxation.

Between March 11, 1936 and August 15, 1950, the Secretary of the Interior, pursuant to the foregoing Act, acquired for the Lower Brule Sioux several tracts of land at a total expenditure of $157,404.46.

31. In support of this offset the defendant introduced in evidence, as defendant's exhibit 04, photostats of the 57 original vouchers in the possession of the General Accounting Office covering all of these purchases. Each voucher shows: voucher number, date of acquisition, legal description of the property, acreage, price per acre, total cost, government check number, date of issue, amount, and the vendor's signature acknowledging receipt of payment for the land. Each voucher states that the land was purchased under the authority contained in section 5 of the foregoing Act, that, as there directed, title was taken in the name of the United States in trust for the Lower Brule Sioux, and shows the volume, page and county where the deed was recorded.

32. The summary statement or tabulation which forms a part of defendant's exhibit 04 lists each of the 57 vouchers by its number and dollar amount. The tabulated total of the face amount of the vouchers is there shown as $157,593.89, or $189.43 more than the $157,404.46 which had been alleged as offsets by the defendant. The reduction of $189.43 was explained by the defendant's witness, Joe B. Wilson, Assistant Chief, Indian Tribal Branch, General Accounting Office, as follows (Tr. 23-24):

> Voucher No. 9-55737 includes an overpayment of $9.10 for taxes, which was later collected. This effected a reduction in that amount—$9.10.
>
> Voucher No. 9-24871 reflects a transposition of the figures used by examiner who misread

the correct figures $3,209.25 as $3,029.25. This effected a reduction of $180.00.

Voucher No. 9-24869 shows the amount paid as $18,548.33 whereas the examiner in preparing the GAO report (Def. Ex. 01, p. 146) omitted the 33 cents, effecting a reduction in that amount.

The foregoing differences aggregating $189.43 account for the discrepancy between the tabulated total of the amounts appearing in the vouchers—$157,593.89 (Def. Ex. 04), and the total amount of $157,404.46 appearing in both the G.A.O. Report (Def. Ex. 01, pp. 142, 146) and the defendant's second amended answer (par. 48, p. 11) as alleged offsets.

33. The Commission concludes that the total amount of $157,404.46 expended by the United States pursuant to section 5 of the Wheeler-Howard Act, 48 Stat. 984, in acquiring for the Lower Brule Sioux the lands described in the 57 vouchers (Def. Ex. 04) constitutes a proper offset against the Commission's award in this action.

* * * *

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

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